ONE HUNDRED SIXTH CONGRESS

Congress of the United States

House of Representatives

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March 24, 2000

BY FACSIMILE

The Honorable Gary S. Guzy
General Counsel
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Guzy:

Thank you for your February 29, 2000 response to my oversight letter of January 14th concerning the Environmental Protection Agency's (EPA's) actions after the formal public comment period for the new source review (NSR) program rulemaking, which ended October 8, 1998. I understand that the rulemaking is still pending, with no end in sight.

Before examining your comments on the procedural issues raised in **Q1** through **Q4** of my January 14th letter, I want to discuss briefly your comments on the substantive concerns raised in **Q5** and **Q6**.

In **Q6**, I asked whether it was a misnomer to describe as "voluntary" the Clean Energy Group's (CEG's) proposal to allow utilities, in lieu of complying with NSR technology-based standards, to participate in a cap-and-trade program for nitrogen oxides (NO_x), sulfur dioxide (SO_2), mercury, and carbon dioxide (CO_2). As I explained, all the CEG proposal would do is offer companies a choice between two *regulatory* options.

This point is critical, because the allegedly "voluntary" program advocated by CEG would have the effect of expanding EPA's *regulatory* web to encompass CO_2, the most ubiquitous byproduct of industrial civilization. As you well know, CO_2 is not currently regulated under the Clean Air Act (CAA); and a strong case can be made that EPA does not have authority under the CAA to regulate CO_2. In addition, many in Congress would regard EPA regulation of CO_2, absent new and specific statutory authorization, as a violation of the Knollenberg funding limitation, which prohibits regulatory implementation of the non-ratified Kyoto Protocol.

You responded: "EPA would consider an alternative to the core NSR program, even an alternative governed by regulations, to be 'voluntary.' The dictionary definition of 'voluntary'

holds that something is voluntary if it 'proceed[s] from the will or from one's own choice or consent ....' WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1322 (1990)." You concluded: "Similarly, if sources are able to choose between different kinds of NSR programs, I believe that choice is voluntary, even though the sources must select one option or the other."

I regret to say that your answer embodies a fundamental error. You confuse "voluntary" in the moral or metaphysical sense (proceeding from the will) with "voluntary" in the legal or programmatic sense (not required or mandated by law). In other words, you confuse the distinction between voluntary and *involuntary* with the distinction between voluntary and *regulatory*.

Granted, anything that proceeds from one's own will, choice, or consent is "voluntary" in contradistinction to such "involuntary" behaviors as falling asleep when injected with sodium pentothal, stumbling when tripped by an assailant, or jerking the knee when tapped with a doctor's mallet. However, the mere fact that companies must *choose* to participate in a cap-and-trade program does not mean the program is "voluntary" in the legal or programmatic sense of the word. Indeed, by your logic, *all* laws and regulations are voluntary (even those enforced by the death penalty), because one may always *choose* to disobey!

Strictly and properly speaking, only those programs that are *non-coercive* are voluntary. For example, the 1605(b) greenhouse gas emissions reduction reporting program run by the Energy Information Administration (EIA) is voluntary. Companies participate for various reasons but neither to satisfy a regulatory requirement nor to avoid an otherwise inescapable regulatory burden. Moreover, because EIA has no regulatory authority, it is not in a position to apply subtle coercion to solicit "volunteers." The same cannot be said of the CEG proposal, which would simply allow companies to choose between alternative regulatory burdens, and in which the agency soliciting the "volunteers" is also in a position to prosecute those same entities.

In short, a *regulatory* requirement, even if it is an *alternative* regulatory requirement, is not a *voluntary* program. To claim otherwise is an abuse of language, if not false advertising.

In **Q5**, I asked about the legality of the CEG proposal. I noted that your predecessor, Jonathan Cannon, in his April 10, 1998 memorandum to EPA Administrator Carol Browner, entitled "EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources," wrote that EPA has interpreted technology-based standards as "not to allow compliance through intersource cap-and-trade approaches." He further stated that "EPA has long held the view that trading across plant boundaries is impermissible under sections 111 and 112." Those sections set the minimum technology-based standards for the NSR program (see §§ 165(a)(3), 169(2)(C)(3), 171(4), 172(c)(5), and 173). Yet the CEG proposal seeks to incorporate emissions trading across plant boundaries within the NSR program. Therefore, I asked: "Could EPA legally revise the NSR program along the lines proposed by CEG simply through a rulemaking, or would Congress need to amend the Clean Air Act?" You responded: "I have not formed my legal opinion regarding this issue and therefore cannot completely answer your question."

I think it would be more accurate to say that you have not answered my question at all, since you do not even present your preliminary thinking, even though EPA has been considering the legality of cap-and-trade approaches within the context of technology-based programs for years, as evidenced by the Cannon memorandum, which references a final EPA rule issued April 22, 1994.[1]

Your professed lack of opinion seems inconsistent with your own previously expressed view. In your December 1, 1999 letter to me, you wrote: "However, the April 10, 1998 Cannon memo noted that with respect to the control of emissions from electric power generating sources, the authorities potentially available under the act 'do not easily lend themselves to establishing market-based national or regional cap-and-trade programs, which the Administration favors for addressing these kinds of pollution problems." In that letter, you quoted Cannon's skepticism about the legality of a CO_2 cap-and-trade program as expressing EPA's current opinion. If you now have doubts about the correctness of Mr. Cannon's opinion, I would be pleased to learn why.

Your testimony at the October 6, 1999 joint hearing expressed no reservation about any part of the Cannon memorandum. Rather, your testimony frequently cited and quoted from the Cannon memorandum, and was explicitly based upon it. I recognize that you are not bound to follow your predecessor's opinion, and are free to change to your own. However, I also cannot help noticing that emissions trading is the principal Kyoto "flexibility mechanism." You seem perfectly willing to follow the Cannon memorandum until it jeopardizes the Administration's preferred policy for implementing the Kyoto Protocol.

Finally, I am not reassured by your statements that "the legal issues presented by a CEG-type proposal, if EPA should propose to adopt such an option, will be subject to public scrutiny as part of notice-and-comment rulemaking," and that "EPA would be obliged in such a rulemaking to publish, as part of its proposal, 'the major legal interpretations and policy considerations underlying the proposed rule.' CAA § 307(d)(3)(C)." EPA should not even consider a rulemaking until the legality of such an action has been clearly and persuasively determined.

As noted above, your predecessor -- and you, yourself -- have already gone on record indicating that CO_2 cap-and-trade program is not legal. Moreover, the CEG proposal, with its "phase two" emission controls for CO_2 coinciding exactly with the Kyoto Protocol's 2008-2012 compliance period, looks suspiciously like a backdoor method of implementing the Protocol under the guise of offering companies a "voluntary" alternative to existing NSR requirements. Given the controversies surrounding both NSR reform and the Knollenberg funding limitation, I think it behooves EPA to clear up the legal status of intersource cap-and-trade programs within the NSR context before EPA considers any further rulemaking.

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[1]National Emission Standards for Hazardous Air Pollutants for Source Categories; Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry, 59 Fed. Reg. 19402 at 19425-26 (April 22, 1994).

Turning now to procedural issues, thank you for pointing out that section 307(d) of the CAA supplants the Administrative Procedure Act's (APA's) procedural requirements, and substitutes a set of procedures EPA must following in promulgating certain CAA rules, including rules promulgated under the NSR program. However, I would note that EPA Administrator Browner's August 6, 1993 "Memorandum To All Employees" (Browner memorandum) which you attach to explain EPA's frequent practice of meeting with "stakeholders" and accepting comments outside the formal notice-and-comment process, takes as its legal authority not section 307(d) but the APA. It states: "In rulemaking proceedings under the Administrative Procedure Act, the basis for Agency decisions must appear in the public record." But, as you properly noted in your response to me, the APA does not apply to this rulemaking or to others under the CAA, "except as expressly provided" in section 307(d). Thus, the Browner memorandum really does not apply to the NSR rulemaking.

In **Q1**, I expressed concerns about irregularities in EPA's NSR rulemaking. Fundamental fairness dictates that the public has equal access to the decisionmakers in any rulemaking. In your response, you admitted "EPA has met with numerous stakeholders interested in the NSR Reform rule, including many meetings which occurred outside of the formal comment period." In **Q4** I expressed concern about potential procedural errors in other EPA major rulemakings. You replied, "We understand this question to ask whether or not EPA has, in other rulemaking actions, held meetings or received comments outside the formal comment period. The Agency does so regularly." However, the very legitimacy of rulemaking by unelected officials depends on their sharing rulemaking proposals, reasoning, data, and public comments *equally* with all members of the public from whom their ultimate governmental authority is derived.

APA and CAA procedural protections ensure an equal opportunity to participate in the rulemaking process by requiring agencies to seek public comment on a proposed rule during a prescribed comment period announced in the Federal Register. In addition, CAA section 307(d)(6)(C) is designed to insure an effective opportunity for public participation in the rulemaking process by providing that "the promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket" (42 U.S.C. § 7607(d)(6)(C)). Courts have struck down rules based upon an agency's extensive reliance on *ex parte* comments, especially when those comments are not readily available from the public docket. For example, a court found a Federal Communications Commission rule invalid on procedural grounds because undisclosed *ex parte* comments made the elaborate public discussion in the docket a "sham" (*Home Box Office Inc. v. F.C.C.*, 567 F.2d 9,15, D.C. Cir. 1977). In the NSR rulemaking, EPA's extensive reliance on *ex parte* communications, which were effectively not available to the public because the docket was so poorly maintained, calls into question the fairness and legitimacy of the rulemaking.

In further response to **Q1** and **Q4** you also provided a copy of the Browner memorandum, which states on page two that "[i]n rulemaking proceedings under the Administrative Procedure Act ... *after* a rule is proposed, be certain that:

1. All written comments received from people outside the Agency (whether during

or *after* the comment period) are entered in the public record for the rulemaking; and
2. A brief memorandum summarizing any significant new data or *information likely to affect the final decision* that is received during a meeting or other conversation is placed in the public record" (emphases added).

I am concerned that the Browner memorandum fails to direct EPA employees to reopen the formal comment period when information, which was received some time after the close of the formal comment period, is considered by EPA in its decisionmaking. The lack of direction to reopen the public comment period suggests that EPA may be failing in achieving its stated goal to "provide for the most extensive public participation possible in decision-making" (Browner memorandum, p. 1). I believe that EPA's practice of not reopening the comment periods for its rulemakings is not fair and leaves EPA's rulemakings open to legal challenge.

In **Q2**, I expressed surprise that the proposals and correspondence discussed at EPA's January 13, 2000 public meeting were not actually available in the appropriate public docket, notwithstanding the contrary representation made at the January 12th meeting with my staff by your deputy and other EPA officials. For the public to participate meaningfully in the rulemaking process, EPA must comply with CAA section 307(d)(4)(B)(i), "which provides that all documents 'of central relevance to the rulemaking' shall be placed in the docket as soon as possible after their availability" (*Sierra Club v. Costle*, 657 F.2d 298, 402 D.C. Cir. 1981). You responded: "Since we received your letter, we have submitted these documents to Docket A-99-44 and they have been placed in the docket." You suggest that this later docketing satisfies the minimal procedural requirements so that the rulemaking will not be overturned in court. However, public participation is more meaningful when relevant documents are available through the docket *before* (not after) holding a public meeting to discuss them.

Your response to **Q2** also stated that EPA mailed copies of the "proposals to members of the public upon request." However, EPA's notice of the meeting in the Federal Register did not mention the proposals at issue, much less explain that the public could request copies (64 Fed. Reg. 71062 Dec. 20, 1999). Furthermore, these non-confidential proposals should have been made publicly available in the docket – the form of disclosure specifically mandated by CAA section 307(d)(4)(B)(i) – without requiring a person to provide his or her name and address to EPA to obtain them.

In **Q3**, I expressed concern that meeting minutes were missing from the NSR reform rulemaking docket. I understand that these minutes summarize highly critical statements about EPA's handling of an earlier rulemaking docket by a representative of a non-industry group. You responded that you have taken steps to place these minutes and associated documents back into the docket. Such meeting minutes must be available in the docket so that commentors and EPA are not tempted to communicate by voice rather than by pen to avoid placing their views before the public (*Sierra Club* at 402).

I also expressed my concern about EPA's poorly-maintained NSR reform rulemaking docket in **Q3**. Congress amended the CAA in 1977 to provide procedural requirements "more stringent than those previously applicable under the [APA]" including, "requiring EPA to

establish a detailed 'rulemaking docket' that is open to the public" (*Union Oil Co. v. U.S. EPA*, 821 F.2d 678, 681-2, D.C. Cir. 1987). Your response indicated that the additional missing documents have been placed in the docket and that the mis-filing of still other documents and document categories has now been corrected. You responded further that EPA staff had previously noted some of these problems in November 1999, but that the docket was not corrected until February 11, 2000. I am concerned that EPA was aware of problems with this docket yet did not correct the problems until almost a month after holding the January 13th public meeting. In fact, I wonder when EPA would have corrected the docket if I had not sent my January 14th oversight letter indicating many problems with the docket.

Therefore, pursuant to the Constitution and Rules X and XI of the United States House of Representatives, I request that you respond to the questions in the enclosure. Please deliver your response to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building not later than noon on Friday, April 14, 2000. If you have any questions about this request, please call Subcommittee Staff Director Marlo Lewis or Counsel Bill Waller at 225-4407. Thank you for your attention to this request.

Sincerely,

David M. McIntosh
Chairman
Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs

cc: The Honorable Dan Burton
The Honorable Dennis Kucinich

QUESTIONS ON EPA RULEMAKING

Q1. My comment on your response to **Q6** of my January 14, 2000 letter makes the following argument: (1) An action may be "voluntary" in the moral or metaphysical sense of *proceeding from the will* yet not be "voluntary" in the legal or programmatic sense of *not required or mandated by law*; (2) to claim otherwise is to assert that *all* government mandates are voluntary, even those enforced by the death penalty, because one may always *choose* to disobey; (3) the Clean Energy Group's (CEG's) proposal for a cap-and-trade scheme would create an alternative *regulatory* requirement within the New Source Review (NSR) program; (4) although more flexible, such a revised NSR would still be fundamentally *coercive*, unlike the Energy Information Administration's greenhouse gas emissions reporting program, which imposes no regulatory requirement or burden on companies which choose not to participate; (5) therefore, calling the CEG proposal "voluntary" is a misnomer or even false advertising, especially because the proposal would expand the Environmental Protection Agency's (EPA's) *regulatory* web to include carbon dioxide (CO_2) a substance not currently regulated under the Clean Air Act (CAA). Do you agree with this argument? If not, please explain which of the foregoing enumerated steps you consider faulty and why.

Q2. In your December 1, 1999 letter to me, you indicated your agreement with former EPA General Counsel Jonathan Cannon's opinion that the authorities potentially available under the CAA "do not easily lend themselves to establishing market-based national or regional cap-and-trade programs, which the Administration favors for addressing these kinds of pollution problems." Yet in your response to **Q5** of my January 14th letter, you profess not to have formed an opinion on the legality of a market-based national or regional cap-and-trade scheme within the framework of the NSR program. Does this mean EPA now has reservations or doubts about Mr. Cannon's opinion regarding the legality of cap-and-trade approaches within technology standards-based programs? If so, please explain the reasons for those doubts or reservations. If not, am I correct in inferring from the Cannon memorandum that revising the NSR program along the lines proposed by CEG would require Congressional action to amend the CAA?

Q3. I appreciate the apology in your February 29, 2000 letter concerning EPA's confusion over whether the alternative utility compliance proposals discussed at the January 13th meeting should be part of a new rulemaking or are part of the ongoing NSR reform rulemaking (for which the formal comment period closed October 8, 1998). Has EPA determined that these proposals and associated documents are of "central relevance" to the NSR reform rulemaking as provided under CAA section 307(d)(4)(B)(i)? Has EPA filed these proposals and associated documents in the NSR reform docket?

Q4. Your response to **Q1** of my January 14, 2000 letter admitted "EPA has met with numerous stakeholders interested in the NSR Reform rule, including many meetings which occurred outside of the formal comment period." Please provide a list of all oral and written (including email) *ex parte* communications making substantive comment on the NSR rulemaking with EPA officials from October 9, 1998 until March 24, 2000. The list should contain identifying information for each person who communicated with EPA, including the person's full name and employer, any organization represented, the full name and title of EPA official(s) involved, the

date of the communication, and whether an EPA official solicited the communication. Please indicate on the list whether or not a summary of each *ex parte* communication was filed in the NSR rulemaking docket. If such a summary is being prepared for docketing, please explain when it will be included in the docket.

Q5. Please identify all EPA open rulemakings or other processes that have established Administrative Procedure Act (APA) or CAA section 307(d) dockets, indicating the subject matter, the date the rulemaking or process was started, the date the docket was opened, the docket number and location, the date the official public comment period closed, the citation for Federal Register notices about the rulemaking, and the status of such rulemaking or other process.

Q6. Please explain whether all such open dockets were complete on March 24, 2000. If any were not, please explain why and their status.

Q7. Please explain what instructions and training are provided to the persons responsible for maintaining and ensuring that public dockets are kept timely and complete. Please provide a copy of any written instructions or training materials on docket maintenance used by EPA, including the date such materials were prepared.

Q8. CAA section 307(d)(6)(C) provides that a final rule "may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation." For EPA rules submitted to the Office of Management and Budget (OMB) for review, could material (from either governmental or non-governmental sources) placed in the docket after such submittal to OMB be considered in the rulemaking?

Q9. Have any lawsuits been filed questioning EPA's rulemaking processes (e.g., compliance with CAA procedural requirements or the APA) since January 20, 1993? If so, please identify each lawsuit (including case number and court name), explain the issues raised concerning EPA's rulemaking process, and state the status of the lawsuit, including a list of any judicial orders or decisions issued.